INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Benton v. *Maryland*, 395 U.S. 784	10
California v. *Taylor*, 353 U.S. 553	9
Fiswick v. *United States*, 329 U.S. 211	10
Grunewald v. *United States*, 353 U.S. 391	6, 7
Hirabayashi v. *United States*, 320 U.S. 81	10
Husty v. *United States*, 282 U.S. 694	9
Hyde v. *United States*, 225 U.S. 347	8, 9
Krulewitch v. *United States*, 336 U.S. 440	7
Lawn v. *United States*, 355 U.S. 339	9
Lutwak v. *United States*, 344 U.S. 604	7
Neely v. *Eby Construction Co.*, 386 U.S. 317	9
Pinkerton v. *United States*, 328 U.S. 640	8, 9, 10
Poliafico v. *United States*, 237 F. 2d 97, certiorari denied, 352 U.S. 1025	9
Toussie v. *United States*, 397 U.S. 112	8
United States v. *Agueci*, 310 F. 2d 817, certiorari denied, 372 U.S. 959	9

Cases—Continued

	Page
United States v. *Borelli*, 336 F. 2d 376, certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960	9
United States v. *Kissel*, 218 U.S. 601	8

Statutes:

18 U.S.C. 371	2
18 U.S.C. 656	2
18 U.S.C. 1005	2, 3, 7
18 U.S.C. 3282	6

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-297

NATHAN PORTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a-27a) is not yet reported. The findings of fact and conclusions of law of the district court (Pet. App. 16a-18a), made in conjunction with the court's announcement of its verdict at the jury-waived trial,[1] are not reported.

[1] The court characterized its findings, as reproduced in the appendix to the petition, as its findings of the "ultimate" facts. Immediately prior to the court's statement as excerpted in the appendix, the court had summarized the facts in substantially greater detail. See pp. 484-499 of the trial transcript, a copy of which is being lodged herewith. The transcript is hereinafter referred to as "Tr."

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1972 (Pet. App. 28a-29a). On July 26, 1972, the Chief Justice extended the time for filing a petition for a writ of certiorari until August 21, 1972 (Pet. App. 30a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's prosecution for conspiracy to misapply bank funds and falsify the bank's books was properly held not barred by the statute of limitations where, though the last misapplication of funds occurred more than five years before the return of the indictment, the last falsification of the bank's books (designed to conceal the misapplications until they could be corrected) occurred within the five-year statutory period.

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a 71-count indictment charging that he and two codefendants conspired to misapply funds of a federally insured bank and to make false entries in the bank's books with intent to defraud the bank and deceive its officers (18 U.S.C. 371, 656, 1005) (Count One) and that they in fact made such false entries (18 U.S.C.

1005) (Counts Two through Seventy-One) (Pet. App. 10a-15a, 18a).[2] On June 25, 1971, petitioner was sentenced to five years' imprisonment on Count One; execution of the sentence was suspended and he was placed on probation for five years on condition that he make restitution in an amount not to exceed $10,000. Imposition of sentence on the substantive counts was suspended and petitioner was placed on probation as to them for five years, to run concurrently with the probationary period prescribed as to Count One (Pet. App. 19a-20a). The court of appeals affirmed (Pet. App. 21a-29a).

In May 1959, codefendant Rebecca Tolkoff, the head bookkeeper of a branch office of Merchants Bank of New York, agreed with petitioner to honor certain checks drawn on his account though the funds in the account were insufficient to pay the checks in ordinary course. She did so in reliance on a promise by petitioner to deposit sufficient funds in his account within a few days to cover the checks. Miss Tolkoff charged the checks, when presented, against accounts of other depositors in which large balances were customarily maintained from month to month. Within a week of the agreement, checks of petitioner in the amount of $26,000 had been falsely processed by Tolkoff in this manner (Pet. App. 23a; Tr. 26-35).

When petitioner failed to make covering deposits as he had promised, Tolkoff pointed out to him that

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[2] The codefendants, Rebecca Tolkoff and Joseph Calabro, pleaded guilty and testified for the government against petitioner.

she was "hiding" his checks and that she was concerned because she never knew when an audit would occur. Petitioner told her that he would soon make a covering deposit. After the scheme had been in operation two weeks, Tolkoff told her superior, codefendant Joseph Calabro, about the situation. Calabro, the head bookkeeper for the entire bank, called petitioner and directed his attention to the fact that Tolkoff was finding it constantly necessary to cover up the misapplication of funds by "fixing figures" and making adjustments in the bank's books. Petitioner told Calabro that a covering deposit would be made shortly and that there was no cause for concern (Pet. App. 24a; Tr. 35-37, 173-176).

Convinced that petitioner would ultimately make good on his checks, Calabro joined in the arrangement. Later he agreed to the honoring of an additional $12,500 worth of insufficient-funds checks of petitioner and to concealment of the improper payments through the same device of falsely debiting other customers' accounts. At the beginning of each month, Tolkoff charged a large account with the full amount of the shortage. Then, at the end of the month, before the monthly statement for the account was made up, she credited the account in the amount it had been debited, thus restoring the proper balance as to it. For a period of a day or two at the end of each month the shortage resulting from the misappropriations of funds was undiscoverable because of inter-branch transfers of accounts (Pet. App. 24a; Tr. 71-75).

By November 1959, as the result of additional mispayments similar to those mentioned, the amount of

the shortage had increased to $66,000. In that month, petitioner and the two bookkeeper confederates met at a restaurant where petitioner, in addition to renewing his pledge to make good on his checks, signed a hand-printed statement acknowledging that he was responsible for the shortage (Pet. App. 24a; Tr. 60-67, 159-165, 186-189, 223-232). In the interim, petitioner had been contacted several times by Tolkoff and Calabro and urged to correct the shortage with a deposit. Though he continued to promise that he would, the funds were never forthcoming. Petitioner was aware throughout the period that Tolkoff was falsifying the bank's books to conceal the payment of his fraudulent drafts. Around the end of 1959 or the beginning of 1960 he disappeared (Pet. App. 24a-25a; Tr. 69-71, 190-191).

Miss Tolkoff's falsifications of the bank's books, begun in 1959, continued until June 1968, when, as the result of a decision by the bank to institute computer accounting, she confessed to the bank's officers what she had been doing (Pet. App. 24a; Tr. 142-149).[3] From 1961 to 1963 petitioner was incarcerated in a New York prison on an unrelated state charge (Tr. 433-435, 446-448; Pet. 10). On August 1, 1968, petitioner, who had in the meantime been discovered operating an automobile business in New Jersey, denied

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[3] The 70 substantive counts of the indictment charged falsifications covering the period from July 1965 to June 1968 (Pet. App. 12a-15a). The same falsifications were also charged as overt acts in furtherance of the conspiracy (Pet. App. 12a-14a).

in an interview with two F.B.I. agents that he had ever had any banking connections with Merchants Bank (Pet. App. 25a; Tr. 286-289).

The indictment was returned July 23, 1970, ten and a half years after the last misapplication of funds resulting from the fraudulent honoring of petitioner's checks, but within 26 months of the last falsification of the bank's books by Miss Tolkoff.

ARGUMENT

1. Petitioner contends, on alternative grounds, that his prosecution on the conspiracy count was barred by the five-year statute of limitations (18 U.S.C. 3282) (Pet. 12-20, 21-22, 26).

a. His principal argument—the only one urged in the court of appeals—is that the only conspiracy to which he was a party was one to misapply the bank's funds and that this conspiracy terminated by November 1959, when the last of his worthless checks was paid without charging his account. He contends that the subsequent false entries in the bank's books were made by the bookkeeper confederates, solely on their own initiative, for the purpose of concealing their criminal misapplication of the bank's moneys; thus, he says, those acts of concealment did not extend the life of the conspiracy for limitations purposes. The argument, which relies on *Grunewald* v. *United States*, 353 U.S. 391,[4] is answered by the

[4] *Grunewald*'s relevant holding was that the duration of a conspiracy cannot be lengthened indefinitely for purposes of the statute of limitations merely because the conspiracy is

opinion of the court of appeals (Pet. App. 25a-27a), on which we rely. We merely note, in addition, that *Grunewald* recognized that "a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime" (353 U.S. at 405; emphasis in original). Here the acts of concealment—the falsifications of the bank's books—were manifestly done in furtherance of the main criminal objectives of the conspiracy; they were, indeed, an essential and constituent part of those objectives. Specifically defined as crimes by 18 U.S.C. 1005, the falsifications were charged in the indictment to be aims of the conspiracy, and the evidence showed that they were central to the scheme by which petitioner was able to have his worthless checks honored by the use of accounting tricks that concealed the misappropriations indefinitely. Hence petitioner's statement that "the principal aim" of the conspiracy was to obtain money without maintaining a sufficient balance in an account (Pet. 18) is too narrow. While that may have been petitioner's aim, the core of the conspiracy was the fraudulent covering of petitioner's checks until petitioner could deposit the funds to make good on

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kept secret and the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purposes have been accomplished (353 U.S. at 399-406). Cf. *Krulewitch* v. *United States*, 336 U.S. 440, 443-444; *Lutwak* v. *United States*, 344 U.S. 604, 615-617.

them. Central to this purpose was the prevention of discovery of the misapplication of the bank's moneys by criminal falsification of the bank's records until such time as petitioner made up the deficiencies.[8]

b. While petitioner was imprisoned from 1961 to 1963 on the unrelated state charge, he assertedly wrote letters to Merchants Bank and to the New York State Banking Department requesting copies of his bank statements for a portion of the relevant period (Pet. 11; Tr. 434, 446-447). His alternative contention based on the statute of limitations is that even if the conspiracy be deemed to have continued beyond 1959, when the last misapplication of funds occurred, he withdrew from it when, in 1961, he went to prison, or at the latest when he wrote the letters, so that in

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[8] Petitioner's contention that the decision below fails to give recognition to a concession by the prosecutor that the statute of limitations had run against one of the charges (Pet. 22; cf. Pet. 6) misstates what the prosecutor conceded. Referring to paragraph 4(a) of the conspiracy count (Pet. App. 11a), in which the payment of petitioner's checks without charging his account was mentioned as one of the "means by which the defendants would carry out the said conspiracy," the prosecutor stated in colloquy that it was conceded by the government that "4(a) * * * is barred" (Tr. 358). The prosecutor's obvious meaning was that a substantive charge based on the misapplication of funds would have been barred by limitations. The indictment in fact did not contain such a charge.

Toussie v. *United States*, 397 U.S. 112, cited by petitioner (Pet. 12-13, 15-16), is not germane. Unlike the offense involved in *Toussie*—failure to register for the draft—conspiracy is, by its nature, ordinarily a continuing offense. Cf. *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Hyde* v. *United States*, 225 U.S. 347, 369-370; *United States* v. *Kissel*, 218 U.S. 601, 607-608.

either case his prosecution was barred (Pet. 21-22). This contention, however, was not made in the court of appeals; there is consequently no occasion for this Court to consider it.[6] The argument in any event has no merit. Incarceration, without more, does not suffice to effect withdrawal from a conspiracy.[7] Nor was the writing of the letters relevant. Withdrawal from a conspiracy requires affirmative action disavowing or defeating its objectives. *Hyde* v. *United States*, 225 U.S. 347, 369; *Pinkerton* v. *United States*, 328 U.S. 640, 646. Petitioner's mere act of requesting copies of his bank statements, without disclosure of or allusion to any of the pertinent conspiratorial events, was not the sort of affirmative action that is required to effect withdrawal from a conspiracy. Cf. *United States* v. *Borelli*, 336 F. 2d 376, 388 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960.

2. Petitioner's other contentions need not be considered because they, like the alternative limitations argument, were not made in the court of appeals. They are in any event similarly insubstantial.

a. Petitioner contends that it was error to convict him on the substantive counts, in which all three

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[6] *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16; *California* v. *Taylor*, 353 U.S. 553, 557 n. 2; *Husty* v. *United States*, 282 U.S. 694, 701-702.

[7] *Pinkerton* v. *United States*, 328 U.S. 640, 646; *United States* v. *Borelli*, 336 F. 2d 376, 389 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960; *United States* v. *Agueci*, 310 F. 2d 817, 838-839 (C.A. 2), certiorari denied, 372 U.S. 959; *Poliafico* v. *United States*, 237 F. 2d 97, 106 (C.A. 6), certiorari denied, 352 U.S. 1025.

confederates were charged with making false entries in the bank's books during the last three years of the conspiracy (Pet. App. 12a-15a), because there was no evidence that he made any of the entries (Pet. 20-21). The falsifications were, however, made pursuant to the conspiracy by one of its members, Miss Tolkoff. They were therefore chargeable to the other members as well. *Pinkerton* v. *United States*, *supra*, 328 U.S. at 645-648; cf. *Fiswick* v. *United States*, 329 U.S. 211, 217.[8]

b. A 1961 indictment naming petitioner as an accused, involving similar charges, the same bank, and roughly the same time period as that involved in the active phase of petitioner's participation in this case (the latter months of 1959), but different codefendants, different checks, and different false entries, was dismissed in 1965 on motion, after the prosecution had presented its evidence, for failure by the government to make out a *prima facie* case (Pet. 10-11; Pet. App. 2a-9a). The district court in this case rejected a defense plea of double jeopardy based on the prior proceeding. While petitioner apparently does not challenge that ruling (cf. Pet. 23), he suggests that if the investigation which led to the earlier indictment had been more efficient it would have more fully revealed the extent of the disorders at the bank,

[8] Moreover, since imposition of sentence on the substantive counts was suspended and petitioner was placed on probation as to them for the same five-year probationary period prescribed for the conspiracy count, the concurrent sentence rule is applicable to this contention. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

including the events involved here. He asserts that he has for that reason been dealt with unfairly in being required to stand trial, twelve years after his active involvement ceased, on the generally similar charges of this case (Pet. 23-25). The answer to the contention is that, limitations considerations aside, a conspirator has no cause for complaining that carefully concealed criminal activities in which he collaborated were not discovered by the authorities sooner.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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